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**VIA HAND DELIVERY**

May 1, 2003

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**MAY - 1 2003**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY**

**EX PARTE**

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, SW, Room TW-A325  
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation  
CC Docket No.s 02-33, 95-20, 98-10

Dear Ms. Dortch,

On April 30, 2003, Dave Baker, Vice President for Law and Public Policy, EarthLink, Richard Whitt, Senior Policy Counsel, MCI, Steven Teplitz, Vice President and Associate General Counsel, AOL Time Warner Inc. ("AOL"), Mark O'Connor and the undersigned, both of Lampert & O'Connor, P.C., met with the following FCC staff regarding the above-referenced proceedings: Carol Matthey (WCB); Michelle Carey (WCB); Cathy Carpino (WCB); Michael Carowitz (WCB); William Kehoe (WCB); Ben Childers (WCB); Darryl Cooper (WCB); Terri Natoli (WCB); Richard Hovey (OET).

In the meeting, we discussed the attached "Proposal to Streamline Title II Regulation of BOC Advanced Services to Promote Diverse Information Services" ("Proposal") and the "Summary of FCC's *Computer Inquiry* Requirements" ("Summary"). The parties explained that the Proposal to streamline and update regulation of BOC broadband telecommunications services is grounded in the FCC's Title II authority under the Communications Act and reflects the core principles of the FCC's *Computer Inquiry* precedent. The parties discussed various aspects of the Proposal and the Summary and responded to staff questions, consistent with the attached documents. The parties emphasized that the Proposal would streamline the complex *Computer Inquiry* precedent and reduce BOC obligations, providing instead a clear, codified rule that will also aid and improve enforcement. The parties also noted that the Proposal would encourage all information services providers to compete free from regulation.

Pursuant to Section 1.1206(b) of the Commission's rules, six copies of this letter, with

**■ Lampert & O'Connor, P.C.**

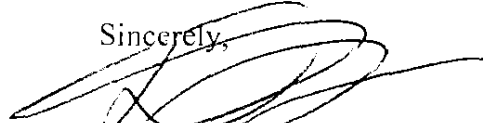
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May 1, 2003

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attachments, are being provided to you for inclusion in the public record of the above-captioned proceedings. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Donna N. Lampert

cc: Christopher Libertelli  
Matthew Brill  
Jessica Rosenworcel  
Lisa Zaina  
Daniel Gonzalez  
William Maher  
Carol Matthey (WCB)  
Michelle Carey (WCB)  
Cathy Carpino (WCB)  
Michael Carowitz (WCB)  
William Kehoe (WCB)  
Ben Childers (WCB)  
Darryl Cooper (WCB)  
Terri Natoli (WCB)  
Richard Hovey (OET)

## SUMMARY OF FCC'S *COMPUTER INQUIRY* REQUIREMENTS

The following chart describes current, significant *Computer Inquiry* requirements, both procedural and substantive, designed to promote information services competition as set forth in the FCC's rules, policy and precedent. Each requirement and a detailed description is set forth; citations are abbreviated for ease of reference although requirements have been discussed and enumerated in many different FCC orders and court decisions spanning decades.

While grounded in Title II principles that have successfully fostered information services competition, *Computer Inquiry* precedent has presented a challenge in interpretation and enforcement. The array of orders and decisions, the level of BOC discretion in interpreting the requirements, and court remands have contributed to uncertainty and confusion regarding the requirements and have sometimes created difficulties for the FCC and Information Service Providers ("ISPs") in administration and enforcement.

### I. *COMPUTER II* Structural Separation Requirements (Applicable to facilities-based common carriers also offering information services)

Basic Requirement	Description
1. Transmission service must be offered separately from information service  77 FCC 2d 384, 475 (1980); 16 FCC Rcd 7418, ¶ 39 (2001); 47 CFR § 64.702	<ul style="list-style-type: none"><li>Facilities-based common carriers must offer to competitive ISPs underlying transmission capacity on the same terms and conditions as to affiliated ISPs</li><li>Transport separated from content; no content control</li><li>Requirement is grounded in Title II, Section 202; FCC's resale requirements also mandate that wireline common carriers provide telecommunications services to competitors (60 FCC 2d 261(1976); 83 FCC 2d 167 (1980))</li><li>Common carriers may provide information services through a separate corporate entity</li></ul>
2. For BOCs, as dominant carriers, the separate transmission service must be offered via tariff  77 FCC 2d 384, 475 (1980); 16 FCC Rcd 7418, ¶¶ 42-44 (2001)	<ul style="list-style-type: none"><li>While BOCs can market telecommunications services with enhanced (information) services, the telecommunications service component must be offered separately to competitive ISPs</li><li>Terms must be tariffed and non-discriminatory as between affiliated and competitive ISPs</li><li>Terms of service are subject to pre-effective regulatory review, including pricing, other terms of service</li></ul>

II. COMPUTER III Comparably Efficient Interconnection ("CEI") Equal Access Requirements (Applicable to the BOCs)

Basic Requirement	Description
1. Interface functionality  104 FCC 2d 958, 1039 (1986); 14 FCC Rcd 4289, 4298 (1999)	<ul style="list-style-type: none"> <li>▪ The BOC must make available standardized hardware/software interfaces to support transmission, switching and signaling functions identical to those used by the BOCs' ISPs</li> <li>▪ Ensures competitive ISPs know what interfaces are necessary to connect to the BOC network</li> </ul>
2. Unbundling of basic services  104 FCC 2d 958, 1036, 1040 (1986); 14 FCC Rcd 4289, 4298 (1999)	<ul style="list-style-type: none"> <li>▪ The BOC must offer basic transmission service separately from the information service under tariff (<i>i.e.</i>, same as <i>Computer II</i> rule above)</li> <li>▪ Also, basic service features of transmission service used by carrier's ISP must be also be offered separately and pursuant to tariff</li> <li>▪ Ensures that an ISP can purchase the underlying telecommunications services</li> </ul>
3. Resale of basic services  104 FCC 2d 958, 1040 (1986); 14 FCC Rcd 4289, 4298 (1999)	<ul style="list-style-type: none"> <li>▪ Same as <i>Computer II</i> rule</li> <li>▪ Designed to prevent improper cost-shifting and anticompetitive pricing in unregulated markets as well as that BOC and non-BOC ISPs pay the same amounts for the underlying BOC telecommunications services</li> </ul>
4. Technical characteristics  104 FCC 2d 958, 1036, 1041 (1986); 14 FCC Rcd 4289, 4298 (1999)	<ul style="list-style-type: none"> <li>▪ Technical characteristics (including bandwidth, bit rates, bit error rates, delay distortions and reliability issues such as mean time between failures, etc.) of transmission service must be equal for all ISPs</li> <li>▪ Ensures that competitive ISPs receive telecommunications services equal in quality to those which the BOCs' customers receive</li> </ul>
5. Installation, maintenance and repair  104 FCC 2d 958, 1041 (1986); 14 FCC Rcd 4289, 4298 (1999)	<ul style="list-style-type: none"> <li>▪ Time periods for installation, maintenance and repair carrier's ISP and other ISPs must be the same</li> <li>▪ Ensures that competitive ISPs can offer their customers support services equal in quality as BOC customers receive</li> </ul>

SUMMARY OF FCC COMPUTER INQUIRY REQUIREMENTS

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Basic Requirement	Description
<p>6. End- user access</p> <p>104 FCC 2d 958, 1041 (1986); 14 FCC Red 4289, 4298 (1999)</p>	<ul style="list-style-type: none"> <li>End -users of competing ISPs can use same basic services and features as are available to end users of carrier's ISP, including equal opportunities to access basic facilities through derived channels, abbreviated dialing or signaling to access enhanced features, etc.</li> <li>Ensures that competitive ISPs' customers will have the same access as BOC customers to special network features offered in conjunction with information services</li> </ul>
<p>7. CEI availability</p> <p>104 FCC 2d 958, 1041 (1986); 14 FCC Red 4289, 4299 (1999)</p>	<ul style="list-style-type: none"> <li>The BOC CEI offering must be fully operational and available to competing ISPs on the day that carrier's ISP uses it, and carrier must offer CEI services prior to that date for purposes of ISP testing and resolution of problems, allowing opportunity to develop, test and resolve any technical issues</li> <li>Ensures that non-BOC ISP is not put at a competitive disadvantage by a BOC initiating service before the BOC makes interconnection available to the competitive ISP</li> </ul>
<p>8. Minimization of transport costs</p> <p>104 FCC 2d 958, 1036, 1042 (1986); 14 FCC Red 4289, 4299 (1999)</p>	<ul style="list-style-type: none"> <li>Carriers must make "good faith" and nondiscriminatory efforts to minimize the ISP's costs of transport between carrier and ISP offices, including demonstrating what steps they will take to reduce transport costs for competitors</li> <li>Ensures that BOCs cannot require competitive ISPs to purchase unnecessarily expensive methods of interconnection with the BOC</li> </ul>
<p>9. Recipients of CEI; Availability to All Interested ISPs</p> <p>104 FCC 2d 958, 1042 (1986); 14 FCC Red 4289, 4299 (1999)</p>	<ul style="list-style-type: none"> <li>Carriers may not restrict the availability of CEI services to any class of customers or competitors</li> <li>Ensures that BOCs do not engage in anticompetitive teaming with one competitive ISP and against others</li> </ul>

### III. COMPUTER III CEI Procedural Requirements (Applicable to the BOCs)

Basic Requirement	Description
1. Web Posting of CEI plans  14 FCC Rcd 4289, 4297 (1999)	<ul style="list-style-type: none"> <li>Provides written explanation of compliance with CEI and the telecommunications services used by BOC-affiliated ISPs; provides information to competitive ISPs regarding their interconnection rights, options and methods</li> <li>Single document aids utility of information and provides benefits over reliance solely on tariffs</li> </ul>

### IV. COMPUTER III Open Network Architecture ("ONA") Requirements (Applicable to the BOCs)

Basic Requirement	Description
1. BOC must unbundle elements of its network, regardless of whether used by its affiliated ISP, in an ONA Plan  104 FCC 2d 958, 1064, 1065-1066 (1986); 2 FCC Rcd 3035 (1987); 3 FCC Rcd 1150 (1988); 4 FCC Rcd 1 (1988)	<ul style="list-style-type: none"> <li>Offers ISPs access to parts of BOC network that would be otherwise unavailable.</li> <li>ONA plans are designed to offer flexible approach that can ensure services can be deployed as circumstances change.</li> <li>ONA features should also include OSS, and other features that are either used by the carrier's ISP or would be useful to ISPs</li> <li>ONA is "technology-neutral" policy not prescription of a particular network architecture</li> </ul>
2. BOC must offer ONA elements (Basic Service Elements ("BSEs"), Basic Serving Arrangements ("BSAs"), Complementary Network Services ("CNSs"), Ancillary Network Services ("ANSs")) under tariff and carrier ISP can only purchase elements under tariff  104 FCC 2d 958, 1064 (1986); 2 FCC Rcd 3035 (1987); 3 FCC Rcd 1150 (1988); 4 FCC Rcd 1 (1988); 5 FCC Rcd 3084, 3087 (1990)	<ul style="list-style-type: none"> <li>Requires BOC to offer ONA services on "equal access" and nondiscriminatory basis and subject to regulatory (federal or state) jurisdiction and review</li> <li>BSAs are fundamental tariffed switching and transport services that allow ISPs to communicate with their end-user customers through the BOC network</li> <li>BSEs are optional unbundled features that an ISP may require or find useful; also defined as building blocks ISPs need to provide service</li> <li>CNS are optional unbundled basic service features that an end-user may obtain from a carrier to access or receive an enhanced service</li> <li>ANSs are other features that BOCs may claim are outside of ONA but that are useful to ISPs</li> <li>OSS capabilities (service order entry and status, trouble reporting and status, diagnostics, monitoring, testing, network configuration and traffic data collection) should be classified as ONA services</li> </ul>

Basic Requirement	Description
<p>3. BOC must have procedures for nondiscriminatory installation and maintenance of ONA services, including OSS</p> <p>104 FCC 2d 958, 1066 (1986); 6 FCC Rcd 7646, 7667 (1991); 11 FCC Rcd 1388, 1398-1399, 1427-1428 (1995); 13 FCC Rcd 6040, 6099 (1998)</p>	<ul style="list-style-type: none"> <li>▪ BOC must have procedures to ensure that installation and maintenance of ONA services is nondiscriminatory, requests (including trouble tickets) are taken on first-come- first-served basis, and that standard intervals for routine installations are made public.</li> <li>▪ If required, letters of authorization prior to initiation of CNS service may not be discriminatory</li> <li>▪ Resale restrictions may not be discriminatory</li> <li>▪ OSS may not be discriminatory and BOCs must discuss their ability to offer such services in the future</li> </ul>

V. **COMPUTER III ONA Procedural Requirements** (Applicable to the BOCs)

Basic Requirement	Description
<p>1. BOC must file and maintain ONA plan at FCC</p> <p>104 FCC 2d 958, 1064, 1067 (1986)</p>	<ul style="list-style-type: none"> <li>▪ Requires regulatory review and approval of BOC proposed ONA plan in order to relieve BOC of requirement to file a CEI Plan for each enhanced service that it offers.</li> </ul>
<p>2. BOC must provide 90-day notice and obtain FCC approval prior to ONA plan amendment</p> <p>104 FCC 2d 958, 1068 (1986); 13 FCC Rcd 6040, 6086 (1998)</p>	<ul style="list-style-type: none"> <li>▪ The 90-day time period is necessary to permit ISPs to develop new offerings on a competitive basis since without the CEI Plan, ISPs will not have specific notice that a carrier is offering a new enhanced service.</li> </ul>
<p>3. BOCs must specify procedures for ISPs to request and receive new ONA services (120-day process); BOCs must honor ISP requests for NIIF technical assistance to evaluate feasibility of new ONA service</p> <p>104 FCC 2d 958, 1066 (1986); 4 FCC Rcd 1, ¶ 397 (1988); 5 FCC Rcd 3084, 3091 (1990); 6 FCC Rcd 7646, 7654 (1991); 13 FCC Rcd 6040, ¶¶ 83-84 (1998)</p>	<ul style="list-style-type: none"> <li>▪ BOCs must provide new elements to ISPs if ISP can show (1) market demand, (2) technical and cost feasibility, and (3) utility to ISPs. The BOC must describe in detail the criteria that it will use in determining when an ISP inquiry constitutes a complete request for a new ONA service and provide an evaluation of whether it will provide the service or the specific reasons for not offering a given service. If an ISP finds the BOC response unsatisfactory, it may seek redress from the FCC by filing a petition for declaratory ruling.</li> </ul>

Basic Requirement	Description
<p>4. BOCs required to file annual ONA report</p> <p>6 FCC Red 7646, 7649-7650 (1991)</p>	<ul style="list-style-type: none"> <li>Report should contain: deployment schedules for ONA for ONA services and disposition of new ONA service requests and requests previously deemed technologically infeasible; SS7, Intelligent Network (IN), and ISDN deployment information; new ONA services available via SS7, IN and ISDN; progress at NIIF on long-term uniformity issues; progress on providing ISPs with BNA, calling number ID and call detail services; progress on developing OSS and ISP access to OSS; list of BSEs used by BOC's ISP; unbundling of new technologies.</li> </ul>
<p>5. BOCs required to provide Semi-Annual ONA report</p> <p>6 FCC Red 7646, 7650 (1991)</p>	<ul style="list-style-type: none"> <li>Report should contain: consolidated matrix of ONA services in federal and state tariffs; ONA Services User Guide; updated information on 118 categories of network capabilities requested by ISPs and how they were addressed; wire center deployment information</li> </ul>
<p>6. BOCs required to file Quarterly Nondiscrimination Reports</p> <p>104 FCC 2d 958, 1055-1056, 1066 (1986)</p>	<ul style="list-style-type: none"> <li>Report compares timeliness of installation and maintenance of categories of ONA services to BOC ISP with that of a sampling of all customers. Report must include total orders, total and percent due date missed, and average intervals.</li> </ul>
<p>7. BOCs required to file an Annual affidavit</p> <p>3 FCC Red 1150, 1161, n. 154 (1998)</p>	<ul style="list-style-type: none"> <li>If BOC affidavit demonstrates that it lacks ability to discriminate in installation or maintenance, then it may file Quarterly Nondiscrimination Report</li> </ul>



**PROPOSAL TO STREAMLINE TITLE II REGULATION  
OF BOC ADVANCED SERVICES  
TO PROMOTE DIVERSE INFORMATION SERVICES**

**Proposed Title II ISP Access Rule: New Section 64.702(c)**

*§ 64.702(c): Each Bell Operating Company (including any affiliate)(hereinafter "BOC") shall provide access to its high-speed network to enhanced and information service providers ("ISPs") in the following manner:*

*(1) Access to Transmission Services and Capabilities*

*Each BOC shall offer to all ISPs, whether affiliated or unaffiliated, all of its high-speed network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions. Such offerings shall be separate from any other BOC services, including enhanced or information services.*

*(2) Transparency*

*(A) With respect to the rates, terms and conditions of the network transmission services and capabilities used by or made available to any ISP, each BOC shall:*

- (i) File an interstate tariff with the Commission describing such rates, terms, and conditions; or*
- (ii) Post on its publicly available Internet website, in an accessible and easy to understand format, current and specific information describing such rates, terms and conditions.*

*(B) If a BOC enters into an individual contract with an ISP for high-speed network transmission services and capabilities, then the BOC shall tariff or post on its publicly available Internet website, in an accessible and easy to understand format, the following information:*

- (i) the term (including renewal option) of the contract;*
- (ii) a description of the high-speed network transmission services and capabilities provided under contract;*
- (iii) minimum volume commitments and price for each of the high-speed network transmission services and capabilities, as well as volume discounts; and*
- (iv) all other classifications, terms or practices affecting the contract rate.*

*(C) Each BOC shall provide advance written notice to all purchasing ISPs, including notice by email, of any changes to the rates, terms, and conditions of any of the BOC's high-speed network transmission services and capabilities. In the event the BOC seeks to discontinue any service or capability used by an ISP, such written notice shall be not less than 120 days prior to the proposed discontinuance.*

(3) Access to New Transmission Services and Capabilities

- (A) *An ISP may request in writing that a BOC provide access to new network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions.*
- (B) *Where the ISP makes such a reasonable request, the BOC shall offer such access within 90 days, unless the Commission extends such time where the BOC, upon petition, demonstrates good cause.*
- (C) *The BOC shall have 15 days to respond in writing to the requesting ISP, and such response shall describe either:*
- (i) how the BOC will offer the requested access within 90 days of the request; or*
  - (ii) the specific basis for the BOC's position that the requested access is not technically feasible or economically reasonable.*

(4) Definitions *For purposes of this subsection (c):*

*"Transmission services and capabilities" shall include, without limitation, the BOC's transmission or telecommunications components or lines, switching and routing components, ordering and operations support systems ("OSS"), signaling, and other network functions or features.*

*"High-speed network" means a network offering transmission rates of more than 200 Kbps in at least one direction.*

Proposed New Rule For Enforcement of ISP Access §1.737

§1.737: ISP Complaints Regarding Rule Section 64.702(c)

*(a) Where a complaint alleges a violation of FCC Rule Section 64.702(c), the following additional procedures shall also apply:*

*(1) In its Answer, the Defendant shall state clearly and precisely all information in its possession, including data compilations (e.g., records of OSS configurations, ordering processes, data on specific orders or maintenance records, etc.), and produce and serve on Complainant and the FCC all such information, including copies of all contracts or arrangements for high-speed network transmission services and capabilities, that may be relevant to the alleged violation of FCC Rule § 64.702(c).*

*(2) If the BOC has not maintained records or other data for the Bureau to resolve fully the alleged violation of FCC Rule § 64.702(c) or if it otherwise fails to produce such data in its Answer, then there shall be a rebuttable presumption in the case that the Complainant has established the alleged violation of FCC Rule § 64.702(c). Complainant may request by motion filed within 10 days after the BOC's Answer an order that such a rebuttable presumption exists in the case; the Bureau shall issue an order granting or denying such motion within 10 days after the time for filing of the BOC's opposition to the complainant's motion.*

*(b) After the 15-day response period has elapsed under FCC Rule §64.702(c)(3), the ISP may file a complaint with the FCC concerning the BOC's compliance with its "new service" obligations.*

*(c) Except if a complaint alleging a violation of FCC Rule § 64.702(c) is accepted for handling on the Accelerated Docket, the Commission shall issue a written order resolving any complaint alleging a violation of FCC Rule § 64.702(c) within 180 calendar days from when such complaint is accepted for filing.*

#### EXPLANATION

This rule is proposed to streamline regulation of the former Bell Operating Companies' ("BOCs") wireline broadband services under Title II of the Communications Act consistent with the public interest. The proposed rule presents a significant streamlining of the various and sometimes overlapping Title II *Computer Inquiry* obligations for broadband (advanced and/or high-speed) services that currently apply to the BOCs, including all affiliated BOC providers of telecommunications. The proposal supplants the current *Computer Inquiry* obligations for BOC wireline broadband services, set forth in myriad FCC orders and precedent, with a set of Title II rules that are deregulatory, simple, flexible and enforceable and that establish clear access for information service providers ("ISPs") to BOC advanced services and networks to enable ISPs to provide a diversity of competitive information services to the public. Further, to assure enforcement of these streamlined access obligations, the proposal includes new procedures, in a new FCC Rule Section 1.737, described below, for handling ISP formal complaints against BOCs. Under the proposed streamlined Title II rules, ISP access to the wireline broadband transmission components of the BOC networks would provide the essential framework for a vibrant information services market that will, in turn, lead to a number of proven consumer benefits, including robust price and service competition among BOC-affiliated and unaffiliated ISPs, creating innovation, diversity and demand for broadband services.

Under this approach, the Commission could eliminate for wireline broadband services current FCC rule sections 64.702(c) and (d) and the particular requirements set forth in the *Computer Inquiry* precedent, and adopt instead a simplified FCC rule section 64.702 (c)(1)-(4), setting forth BOC Title II obligations in a simple, comprehensible and streamlined manner. More specifically, the proposed rules would eliminate for wireline broadband services a variety of specific *Computer III* and *Computer II* obligations, stated in various FCC orders, including certain: Comparably Efficient Interconnection (“CEI”) obligations, such as the nine CEI parameters; Open Network Architecture (“ONA”) unbundling obligations; CEI procedural obligations, such as CEI plan maintenance, reporting, and web-posting; ONA plan maintenance and prior FCC approval for ONA plan changes; reporting/filing obligations such as the Annual ONA Report, Semi-Annual ONA Report, Quarterly Nondiscrimination Report, and Annual Officer Affidavit; obligations to tariff the *Computer III* basic service elements (“BSEs”) and basic service access arrangements (“BSAs”); and the current rule section 64.702(c) regarding a *Computer II* separate subsidiary.

#### **I. NEW SECTION 64.702 (C)**

##### **Proposed Title II ISP Access Rule: New Section 64.702(c) (1)**

§ 64.702(c): *Each Bell Operating Company (including any affiliate)(hereinafter “BOC”) shall provide access to its high-speed network to enhanced and information service providers (“ISPs”) in the following manner:*

(1) *Access to Transmission Services and Capabilities* *Each BOC shall offer to all ISPs, whether affiliated or unaffiliated, all of its high-speed network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions. Such offerings shall be separate from any other BOC services, including enhanced or information services.*

##### **Explanation of § 64.702(c)(1):**

The proposed Title II rule is intended to take a broad and “bright-line” approach for all ISPs to have access to the same functionalities of the BOC wireline broadband networks,

including installation and maintenance of such functionality, whether used by unaffiliated or affiliated ISPs. The relevant definitions in new § 64.702(c)(4) make clear that associated functions for ordering, repairing and/or signaling continue to be a key component for competition among ISPs and for rapid deployment to the public, and thus the proposed rule ensures openness of the BOC network, as well as associated functions, systems and databases.

Building on the core Title II obligations of Sections 201(b) and 202(a) of the Communications Act barring discriminatory and unreasonable practices, this rule would ensure that the BOCs provide ISPs with access that is not only reasonable, but that is also equal and nondiscriminatory with the treatment and access the BOC provides to its own ISP operations and to other ISPs for broadband services. Thus, for example, if a BOC-affiliated or preferred ISP has access to electronic OSS, databases, or other systems, then the BOC must ensure that competing ISPs have substantially equivalent access. Further, consistent with nondiscrimination, if BOCs collocate information service equipment of affiliated or preferred ISPs, the BOCs would impute reasonable transport costs in a manner similar to minimization of transport precedent. In general, the FCC's Title II precedent, including information services precedent, would inform the Commission's interpretation and enforcement of the new rule. In this way, all ISPs will have maximum opportunity to compete and maximum incentive to create high quality, low price and valuable services for consumers.

As the BOCs introduce new broadband services, they must also reasonably offer access to competing ISPs and continue to offer services relied upon by ISPs and their customers. ISPs, for example, have deployed substantial high-speed information services to the public relying upon a dedicated and reliable connection for the customer, and it would be unreasonable, and a rule violation, for the BOC to discontinue or degrade such services.

**Proposed Transparency Requirement: New Section 64.702 (c) (2)**

(2) Transparency

(A) *With respect to the rates, terms and conditions of the network transmission services and capabilities used by or made available to any ISP, each BOC shall:*

- (i) *File an interstate tariff with the Commission describing such rates, terms, and conditions; or*
- (ii) *Post on its publicly available Internet website, in an accessible and easy to understand format, current and specific information describing such rates, terms and conditions.*

(B) *If a BOC enters into an individual contract with an ISP for high-speed network transmission services and capabilities, then the BOC shall tariff or post on its publicly available Internet website, in an accessible and easy to understand format, the following information:*

- (i) *the term (including renewal option) of the contract;*
- (ii) *a description of the high-speed network transmission services and capabilities provided under contract;*
- (iii) *minimum volume commitments and price for each of the high-speed network transmission services and capabilities, as well as volume discounts; and*
- (iv) *all other classifications, terms or practices affecting the contract rate.*

(C) *Each BOC shall provide advance written notice to all purchasing ISPs, including notice by email, of any changes to the rates, terms, and conditions of any of the BOC's high-speed network transmission services and capabilities. In the event the BOC seeks to discontinue any service or capability used by an ISP, such written notice shall be not less than 120 days prior to the proposed discontinuance.*

**Explanation of § 64.702(c)(2):**

This subsection of the proposed rule would streamline for wireline broadband services the *Computer II* and *Computer III* requirements that BOCs tariff (with the Commission and/or state regulatory agencies) the elements of the broadband services and instead proposes an alternative approach to transparency. At the same time, BOCs would still be required to provide service to ISPs, including affiliated ISPs, on rates, terms and conditions that are transparent and publicly available for all ISP customers and competitors. This rule does not restrict the BOC's ability to

establish broadband rates or terms that are novel or tailored to the needs of specific classes of ISP customers, such as low-volume or high-volume arrangements.

Under the proposal, the BOC may choose whether to use existing FCC tariffing processes for BOC wireline broadband services or to web post rates, terms, and conditions, similar to the way that FCC rules require nondominant interexchange carriers to webpost their rates, terms and conditions. *See* 47 C.F.R. § 42.10. The rule also makes clear in subsection 64.702(c)(2)(B) that in the event the BOC enters into an individual case basis contract with any ISP for high-speed network transmission services and capabilities, it must continue to make public the basic parameters of such contract, consistent with requirements governing contract tariffs today. *See* 47 C.F.R. § 61.55(c). The requirement of prior notice in subsection 64.702(c)(2) to existing ISP customers will ensure that ISPs are provided advance information should the BOC intend to make changes to the services upon which the ISPs and their customers rely. In addition, given that ISPs have deployed significant high-speed information services to the public relying upon BOC services and capabilities, this rule would require 120 days notice for discontinuance, to allow the ISP to transition reasonably to a new service or to request continuation of the service pursuant to subsection 64.702(c)(3).

By its operation, the rule would require the BOC to meet all of its safeguard obligations; in the case of a rule violation, the Commission would have authority to order any equitable or compensatory relief, as it deems appropriate to remedy the matter.

**Proposed New Capabilities Requirement: New Section 64.702(c) (3)**

*(3) Access to New Transmission Services and Capabilities*

*(A) An ISP may request in writing that a BOC provide access to new network transmission services and capabilities on just, reasonable and nondiscriminatory rates, terms, and conditions.*

- (B) Where the ISP makes such a reasonable request, the BOC shall offer such access within 90 days, unless the Commission extends such time where the BOC, upon petition, demonstrates good cause.*
- (C) The BOC shall have 15 days to respond in writing to the requesting ISP, and such response shall describe either:*
- (i) how the BOC will offer the requested access within 90 days of the request; or*
  - (ii) the specific basis for the BOC's position that the requested access is not technically feasible or economically reasonable.*

**Explanation of § 64.702(c)(3):**

To promote full and robust wireline broadband information services competition, with its proven and clear consumer welfare benefits, the proposed rule ensures that as new services, capabilities and functionalities emerge, consistent with the evolution of technology and network design, ISPs have continuing access so that they can provide innovative broadband information services to their customers. The rule would also enable ISPs to continue using services that the BOCs may seek to discontinue for their own ISPs by requesting such access as a “new” service. Once the BOC provides a service pursuant to this subsection, that service would be offered pursuant to the terms of subsections 64.702(c)(1) and (2), requiring just, reasonable and nondiscriminatory rates, terms and conditions and transparency, to allow all ISPs to avail themselves of the offering

The proposed rule would eliminate for wireline broadband services the sometimes complex and cumbersome ONA process, which includes ONA plans, ONA plan amendments, the Annual and Semi-Annual ONA Report, and similar specific requirements that are related to these obligations. The proposed rule would also eliminate for wireline broadband services ONA reporting and other ONA safeguards and, instead, require a simple process for service requests, with marketplace negotiations and enforceable ISP rights of access.



The ability of unaffiliated ISPs to introduce new information services depends on their ability to obtain access arrangements that are otherwise not in use specifically by the BOC ISP. While this was a central tenet of the ONA process, the proposed rule greatly simplifies for wireline broadband services the former process and regulatory framework. *Third Computer Inquiry, Report and Order*, 104 F.C.C. 2d 958, 1064-66 (1986). Thus, ONA plans, amendments, reporting and record keeping are not the focus of the new approach. If an ISP makes a legitimate request for a new wireline broadband service or capability, however, then it is vitally important for the BOC to offer such access in an expeditious manner, since otherwise new broadband information services will not reach the market and, equally important, the BOC ISP could strategically limit or delay its use of services or capabilities to prevent competitive new broadband services from reaching consumers. Under this rule, the BOC would be required to respond to ISP requests for new wireline broadband service transmission services and capabilities with reasonable rates and terms of service. The right to request and, if necessary, follow up with an enforcement action would establish a minimum of regulation and an enforceable right for the introduction of creative new information services to the American public.

**Proposed Definitions: New Section 64.702(c) (4)**

(4) *Definitions For purposes of this subsection (c):*

*"Transmission services and capabilities" shall include, without limitation, the BOC's transmission or telecommunications components or lines, switching and routing components, ordering and operations support systems ("OSS"), signaling, and other network functions or features.*

*"High-speed network" means a network offering transmission rates of more than 200 Kbps in at least one direction.*

**Explanation of § 64.702(c)(4):**

The definitions of the proposed rule are designed to encompass for wireline broadband offerings the type of functionalities, services and capabilities referenced throughout the

*Computer Inquiry* proceedings, including functionality necessary for ISPs to provide broadband-based services to consumers such as OSS and similar capabilities. The definitions are premised on the principle that access is only viable if it can be used efficiently. The definition of “high-speed network” tracks the definition previously adopted by the FCC. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities, Third Report*, 17 FCC Rcd. 2844, ¶ 7 (2002) (As it has done in prior reports on advanced services, FCC adopts “the term ‘high-speed’ to describe services with over 200 kbps capability in at least one direction”).

## **II. NEW SECTION 1.737 – ENFORCEMENT**

### **Proposed New Rule For Enforcement of ISP Access Rule – § 1.737**

*§1.737: ISP Complaints Regarding Rule Section 64.702(c)*

*(a) Where a complaint alleges a violation of FCC Rule Section 64.702(c), the following additional procedures shall also apply:*

*(1) In its Answer, the Defendant shall state clearly and precisely all information in its possession, including data compilations (including records of OSS configurations, order processes, data on specific orders or maintenance records, high-speed network transmission services and capabilities deployment, etc.), and produce and serve on Complainant and the FCC all such information, including copies of all contracts or arrangements for high-speed network transmission services and capabilities, that may be relevant to the alleged violation of FCC Rule § 64.702(c).*

*(2) If the BOC has not maintained records or other data for the Bureau to resolve fully the alleged violation of FCC Rule § 64.702(c) or if it otherwise fails to produce such data in its Answer, then there shall be a rebuttable presumption in the case that the Complainant has established the alleged violation of FCC Rule § 64.702(c). Complainant may request by motion filed within 10 days after the BOC's Answer an order that such a rebuttable presumption exists in the case; the Bureau shall issue an order granting or denying such motion within 10 days after the time for filing of the BOC's opposition to the complainant's motion.*

*(b) After the 15-day response period has elapsed under FCC Rule §64.702(c)(3), the ISP may file a complaint with the FCC concerning the BOC's compliance with its “new service” obligations.*

*(c) Except if a complaint alleging a violation of FCC Rule § 64.702(c) is accepted for handling on the Accelerated Docket, the Commission shall issue a written order resolving any complaint alleging a violation of FCC Rule § 64.702(c) within 180 calendar days from when such complaint is accepted for filing.*

**Explanation of § 1.737:**

The proposed rule would facilitate significant streamlining of the various Title II *Computer II* and *Computer III* obligations, as explained above, by providing ISPs with effective enforcement in complaint actions when significant BOC misconduct has occurred. As a Title II-based rule, Section 208 and existing FCC and judicial precedent would remain relevant to determine what is just, reasonable and/or nondiscriminatory under the Communications Act.

The proposed rule reflects the fact that due to ISP reliance upon the BOCs, the BOC controls much of the information relevant to a fair and accurate determination of whether a rule violation has occurred. It is the BOC that controls the OSS systems, maintenance records, configurations of systems, and access to the transmission components and capabilities, as well as the ability to modify those things for its benefit. Typically, the ISP does not have access to this information, especially in cases where discriminatory practices are alleged. To address this disparity, various *Computer Inquiry* obligations imposed several reporting and certification obligations to ensure nondiscrimination and transparency by the BOC. The proposed deregulatory approach, however, eliminates for wireline broadband services BOC reporting and similar obligations. Instead, to ensure the effective administration of justice, the protection of the public interest, and to avoid the potential for pre-litigation evidence destruction, the BOC is held responsible for producing all necessary information to resolve any complaints that may arise. If the BOC cannot do so or has chosen record maintenance or retention systems that are inadequate for the Commission to resolve the dispute, then the burden is placed properly on the BOC to demonstrate that no rule violation has occurred. This limited shift of burden is consistent with FCC and judicial precedent in cases where the defendant has failed to produce evidence within its exclusive access or control that is necessary for adjudication of the dispute. FCC rules and

precedent are wholly consistent with this approach. Cf. 47 C.F.R. § 64.1150(d). See also, *In the Matter of WorldCom, Inc.*, Order, DA 02-2569 (rel. Oct. 8, 2002); *In the Matter of Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd. 22497, ¶ 278 (1997); *In re Complaint of L. Douglas Wilder and Marshall Coleman Against Station WRIC-TV Petersburg, Virginia*, Further Discovery Order, 12 FCC Rcd. 4111, ¶27 (1997). Indeed, Part 42 of the Commission's rules requiring carriers to retain certain records, 47 C.F.R. § 42.1 *et seq.*, "was established to ensure the availability of carrier records needed by this Commission to meet its regulatory obligations." *In the Matter of Revision of Part 42*, Report and Order, 60 R.R. 2d (P&F) 1529, ¶ 2 (1986).

In addition, because experience has shown that enforcement delay can effectively become a denial of access in the rapidly moving broadband information services arena, the rule would require resolution of complaints within 180 days. For the same reasons, it is assumed that the Enforcement Bureau would make more frequent use of the accelerated docket process to resolve cases of enforcement of the ISP access rule.